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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DURANT TOWERS OWNERS
ASSOCIATION,

Plaintiff and Respondent,

v.

SUSAN M. WINCHESTER,

Defendant and Appellant.

B288966

(Los Angeles County
Super. Ct. No. SC126503)

APPEAL from an order the Superior Court of Los Angeles
County. Lisa Hart Cole, Judge. Affirmed.

Susan M. Winchester, in pro. per., for Defendant and
Appellant.

Kulik Gottesman Siegel & Ware, Leonard Siegel and
Mitchell S. Brachman for Plaintiff and Respondent.

* * * * *

This appeal concerns a dispute over attorney fees incurred by plaintiff and respondent Durant Towers Owners Association in its action to enforce the covenants, conditions and restrictions (CC&R's) governing a common interest residential development located on Durant Drive in Beverly Hills. Defendant and appellant Susan M. Winchester, an owner of one unit in the development, contends the trial court lacked jurisdiction over the action because plaintiff failed to exhaust administrative remedies before filing this action, and the court abused its discretion in declaring plaintiff the prevailing party and awarding statutory attorney fees.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Under the terms of the CC&R's, plaintiff is charged with the obligation to maintain and repair the common areas of the common interest development known as Durant Towers as well as separate interests related to the common areas. (CC&R's, § 4.02.) Defendant is the owner of an upper floor unit in the development and is bound by the terms and conditions of the CC&R's. (Civ. Code, § 5975, subd. (a) ["The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development."].)

The CC&R's also specifically empower plaintiff to enter individual units within the development upon three days notice "as necessary [for the] construction, maintenance or emergency repair" of common area improvements and utilities, or immediately in the event of an emergency. (CC&R's, § 4.02(i).)

Sometime in early 2016, plaintiff was notified by the owner of the unit below defendant's unit that there was a water leak

causing discoloration of his ceiling. A plumbing contractor hired by plaintiff assessed the situation and determined that the leak may have been coming from defendant's unit. Throughout February and March 2016, plaintiff made repeated efforts to obtain access to defendant's unit to assess the problem further. Defendant "would not permit access."

By August 2016, the owner of the downstairs unit advised plaintiff the problem was continuing and appeared to be getting worse. That owner threatened legal action if the problem was not remediated. Plaintiff again requested access to defendant's unit to attempt to address the problem, including by way of written correspondence. Defendant did not respond or otherwise allow access. Further, defendant refused to provide a telephone number or email address and insisted on communicating with plaintiff and its counsel only by mail. Defendant also refused to comply with efforts by counsel for the downstairs unit owner to remedy the situation.

After repeated requests for access to defendant's unit were ignored or denied, plaintiff filed this action against defendant for declaratory relief and nuisance. Item 1 in plaintiff's prayer for relief was a request for an "order requiring [defendant] to permit [plaintiff's] contractors unfettered entry" to her unit for the purpose of assessing and repairing the plumbing issue causing damage to the downstairs unit and common areas. Plaintiff filed a certificate of compliance pursuant to Civil Code section 5950, stating that injunctive relief was being sought.

Shortly thereafter, plaintiff filed a first amended complaint. The only material change in the pleading was the attachment of the correct version of the operative CC&R's for the development. Plaintiff also filed an ex parte application for a temporary

restraining order and an order to show cause why a preliminary injunction should not be granted compelling defendant to allow access to her unit for the purpose of assessing and repairing the plumbing problem that was causing damage to the downstairs unit.

The court ordered defendant to appear on December 9, 2016 to show cause why the injunction should not issue.

Defendant filed a response stating she had not been timely served. Defendant also filed a document stating that plaintiff had failed to meet and confer regarding a responsive pleading and asserting entitlement, pursuant to Code of Civil Procedure section 430.41, subdivision (a)(2), to a 30-day extension of time within which to file a responsive pleading to the first amended complaint.

At the December 9, 2016 hearing, counsel for plaintiff conceded they had not been able to timely serve defendant because of her refusal to communicate by phone or email and her efforts to evade personal service. With the assistance of the court, the parties stipulated to a continuance of the hearing on the preliminary injunction to January 25, 2017, and defendant agreed to allow access to her unit by a specific, agreed-upon plumbing company with 10 days advance notice.

According to plaintiff, defendant thereafter reneged on the agreement and once again refused to allow access to her unit until January 24, 2017. On that date, the contractor was only able to assess the situation and determine what needed to be done but was not able to complete repairs.

The hearing on the injunction therefore proceeded on January 25, 2017. Defendant was present and participated in the hearing. The court granted plaintiff's request for an

injunction compelling defendant to allow entry into her unit to make the necessary plumbing repairs upon 48 hours notice. The court ordered that service of the notice could be accomplished by posting on the door of defendant's unit.

The necessary plumbing repairs were completed on February 22, 2017.

Thereafter, plaintiff filed a request for dismissal of the action without prejudice. The dismissal was entered on May 15, 2017.

Plaintiff filed a memorandum of costs and filed a motion for attorney fees pursuant to Civil Code section 5975 and section 18.02 of the CC&R's. Defendant opposed the motion, arguing the court lacked subject matter jurisdiction of the dispute because plaintiff had not exhausted administrative remedies prior to filing the action and because plaintiff was not a prevailing party. Defendant had not yet filed a responsive pleading.

After entertaining argument, the trial court granted plaintiff's motion, finding that plaintiff "clearly achieved its litigation objection" which was primarily "to gain legal access" to defendant's unit to make repairs which defendant had been refusing to allow. The court awarded plaintiff statutory attorney fees pursuant to Civil Code section 5975 in the amount of \$19,223, in addition to litigation costs of \$815.

This appeal followed.

DISCUSSION

We review the trial court's prevailing party determination and grant of attorney fees for abuse of discretion. (See *Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 94;

Heather Farms Homeowners Assn. v. Robinson (1994)

21 Cal.App.4th 1568, 1574 (*Heather Farms*).) We find no abuse.

Plaintiff brought this action to enforce the CC&R's of the common interest development. "The Davis-Stirling Act governs an action to enforce the recorded covenants and restrictions of a common interest development. Civil Code section 5975 provides that the CC&Rs may be enforced as 'equitable servitudes' and that '[i]n an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs.' (Civ. Code, § 5975, subds. (a), (c).) Reviewing courts have found that this provision of the Davis-Stirling Act "reflect[s] a legislative intent that [the prevailing party] receive attorney fees *as a matter of right* (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied." ' ' ' (*Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 773 (*Almanor*).)

Moreover, the "Davis-Stirling Act does not define 'prevailing party' or provide a rubric for that determination. In the absence of statutory guidance, California courts have analyzed analogous fee provisions and concluded that *the test for prevailing party is a pragmatic one, namely whether a party prevailed on a practical level* by achieving its main litigation objectives." (*Almanor, supra*, 246 Cal.App.4th at p. 773, italics added; accord, *Heather Farms, supra*, 21 Cal.App.4th at p. 1574 & *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1153-1154.)

It is clear from any fair reading of plaintiff's pleading that its main objective in filing suit was to obtain access to defendant's unit in order to assess the nature of, and ultimately fix, the plumbing problem that was causing damage to another owner's

unit and potentially causing common area damage inside the walls of that structure within the residential development. The prayer for relief also included a request for damages, but that takes nothing away from the obvious focus of the litigation.

It is equally clear from the record that defendant's conduct caused unreasonable delay in accomplishing this goal. The repairs were not able to be made until after the court issued the preliminary injunction mandating defendant's compliance. Once those repairs were accomplished, plaintiff filed a request for dismissal without prejudice. We find no fault in the trial court's conclusion that plaintiff was a prevailing party on such facts.

Moreover, under section 18.02 of the CC&R's and Civil Code section 5975, plaintiff was entitled to an award of reasonable attorney fees. (*Almanor, supra*, 246 Cal.App.4th at p. 773.)

Defendant has not shown any basis for concluding the trial court abused its discretion in awarding \$19,223 in attorney fees. Defendant argues the court lacked subject matter jurisdiction in the first instance, pointing to section 3.08 of the CC&R's. That section states that plaintiff was required to exhaust internal remedies before filing an action, specifically providing defendant an opportunity for a hearing. Defendant has not shown that plaintiff failed to exhaust any extra-judicial remedy before filing suit. Plaintiff tried for months to communicate with defendant and resolve this matter short of litigation. The record shows defendant evaded and thwarted these efforts and certainly at no time requested a hearing in accordance with the CC&R's.

Plaintiff then proceeded to file this action, seeking, as we already explained above, primarily injunctive relief. Under Civil Code section 5950, subdivision (a)(3), plaintiff's certification that

injunctive relief was necessary satisfied the statutory requirement under the Davis-Sterling Act (§ 4000 et seq.) for prelitigation efforts to resolve the dispute prior to filing a complaint.

Defendant cites no other basis for concluding the trial court was without jurisdiction to entertain the action and to award fees upon its resolution.

DISPOSITION

The order awarding plaintiff and respondent Durant Towers Owners Association attorney fees is affirmed. Plaintiff and respondent shall recover its costs of appeal.

GRIMES, Acting P. J.

WE CONCUR:

WILEY, J.

ADAMS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.